STATE OF MICHIGAN

COURT OF APPEALS

BARBARA WILSON,

Plaintiff-Appellant,

V

LISA SHEA,

Defendant-Appellee.

UNPUBLISHED
May 11, 2006

No. 266044
Wayne Circuit Court
LC No. 04-433243-NO

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order denying plaintiff's motion for leave to amend her complaint and granting summary disposition under MCR 2.116(C)(10) to defendant in this premises liability action. We affirm.

I

The underlying facts are not in dispute. Plaintiff, 58-years-old and a 25-year Michigan resident, was injured when she slipped and fell down the steps of defendant's front porch on a February afternoon. Plaintiff had been to defendant's home approximately 5-6 times before the incident for various holidays including birthdays and Christmas. In addition to the front door, defendant's residence has a back door and a side entrance off the driveway.

On the day of the incident, plaintiff went to defendant's residence to take her shopping. Defendant had injured her leg and was on crutches. Plaintiff parked her car in the driveway and proceeded to defendant's porch. The sidewalk to the porch was covered with light snow (less than an inch), but deeper snow was on the side. When plaintiff reached the two front steps, she walked up the right side of the front steps to defendant's front door without incident. Plaintiff went inside for approximately ten minutes. As plaintiff and defendant were leaving the residence, defendant stopped to lock the door. Meanwhile, plaintiff continued down the left side of the steps, the side opposite from the side she ascended. When plaintiff placed her right foot on the first step closest to the porch, she slipped and fell to the sidewalk. Defendant descended the steps without incident to assist plaintiff, who was taken to the hospital by ambulance for

treatment.[1]

Plaintiff filed a complaint in circuit court seeking damages for a tibial plateau fracture, knee and leg injuries. Plaintiff alleged defendant failed to maintain the premises in a safe manner and failed to warn "invitees" of any dangerous conditions.

Defendant filed a motion for summary disposition under MCR 2.116(C)(10), asserting that the open and obvious doctrine barred plaintiff's claims. In response, plaintiff argued that snow covered ice is not open and obvious, and that whether the conditions resulting in her fall were open and obvious was a question of fact for the jury. Plaintiff also argued, based on a report and affidavit from Theodore Dzuirman, P.E., a licensed engineer, that even if the hazard could be considered open and obvious, special aspects existed to impose liability. Dzuirman opined that the absence of a handrail on the steps (allegedly in violation of the BOCA building code), the absence of gutters, and the accumulation of snow on the awning over the steps which allowed water to accumulate, drip and allegedly cause an unnatural accumulation of ice on defendant's steps, all contributed to plaintiff's accident.

Plaintiff also filed a motion to amend her first complaint to add an assertion that defendant's alleged failure to timely repair her leaking awning constituted a nuisance. In support of her nuisance claim, plaintiff relied on *Bishop v Northwind Investments, Inc*, unpublished per curiam opinion of the Michigan Court of Appeals, entered September 16, 2004 (Docket No. 250083) (*Bishop I*) (Griffin, J. dissenting). Defendant opposed the motion to amend, on the basis that plaintiff was attempting to avoid application of the open and obvious doctrine by relabeling her negligence claim as one for nuisance, that the facts of the case did not constitute a nuisance, and that plaintiff's reliance on *Bishop I* was misplaced since the Supreme Court had reversed the Court of Appeals in *Bishop v Northwind Investments, Inc*, 473 Mich 861; 699 NW2d 302 (2005) (*Bishop II*).

The trial court granted summary disposition in favor of defendant on plaintiff's premises liability claim on the ground that the danger was open and obvious and denied plaintiff's motion for leave to amend the complaint. The trial court determined that the hazard was open and obvious and no special conditions existed to impose liability contemplated under *Lugo v Ameritech Corp*, 464 Mich 516, 518; 629 NW2d 384 (2001). The trial court rejected, as untenable in a private home context, plaintiff's argument that the hazard was unavoidable when plaintiff had the option to wait for defendant. In denying plaintiff's motion to amend the complaint to add a nuisance claim, the trial court concluded plaintiff could not establish the elements of a nuisance claim given that (1) the Supreme Court reversed *Bishop I*, (2) the general public did not enjoy a right to the stairs of a private residence, (3) the awning did not pose a danger to the community, and (4) plaintiff lacked standing to assert a private nuisance claim. Plaintiff now appeals.

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[1] In early spring 2004, the awning over defendant's porch was replaced with a new aluminum awning.

II

When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Id*.

This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). Generally, leave to amend a complaint shall be freely granted where justice requires. MCR 2.118(A)(2); *Tierney v Univ of Michigan Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003). Leave to amend should be denied, however, where amendment would be futile. MCR 2.118(A)(2); *Tierney, supra* at 687.

III

Plaintiff argues that the trial court erred when it determined that the condition of defendant's front steps was open and obvious**.** We disagree.

In a premises liability action, a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000). The duty a possessor of land owes a plaintiff depends on the plaintiff's status on the land. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000). A social guest is a licensee, and social guests assume the ordinary risks associated with their visit. *James v Alberts*, 464 Mich 12, 19; 626 NW2d 158 (2001). Thus, a landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. *Id*. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. *Id*.

Whether a particular danger is open and obvious depends on whether it is reasonable to expect an average user of ordinary intelligence to discover the danger upon casual inspection. *Eason v Coggins Mem Christian Methodist Episcopal Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995). The fact that a party claims that he did not know of the condition is irrelevant. *Novotney v Burger King Corporation (On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

In this case, the condition of the steps was so obvious that plaintiff should have reasonably expected to discover it. Under Michigan law, the general rule pertaining to steps and differing floor levels is that they are "not ordinarily actionable unless unique circumstances surrounding the area in issue made the situation unreasonably dangerous." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614; 537 NW2d 185 (1995). In addition, the fact that snow potentially

covered the ice does not make the condition "hidden." This Court has held that, absent special circumstances, the hazards presented by ice and snow are open and obvious and do not impose a duty on the property owner to warn or remove the hazard. *Corey v Davenport (On Remand)*, 251 Mich App 1, 4-5, 8; 649 NW2d 392 (2002).

Plaintiff contends summary disposition was improper because no evidence was presented by defendant that plaintiff had visual cues or "actual" knowledge of the snow covered ice. Again, we disagree. Courts use an objective test to decide whether a condition is open and obvious, and the relevant question is "whether it is reasonable to expect an average person of ordinary intelligence to discover the danger upon casual inspection." *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 10; 574 NW2d 691 (1997). "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] . . . was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce, supra* at 238-239. The fact that a party claims that he did not know of the condition is irrelevant. *Novotney, supra* at 475.

Here, a reasonable person in plaintiff's position would foresee the danger. Plaintiff had been a Michigan resident for 25 years. The incident took place in early February. Plaintiff's own evidence established that measurable precipitation occurred five days before the incident and that temperatures remained below freezing between January 27, 2004 and the day of the accident. Thus, a reasonable person in plaintiff's position should have anticipated that, given the continuous freezing temperatures, any fallen precipitation on the ground from five days prior, i.e. snow or ice underneath, would remain frozen and be hazardous.

Accordingly, the trial court properly concluded the condition was open and obvious and that defendant neither owed nor breached a duty to plaintiff.[2] Defendant's motion for summary disposition was properly granted.

Plaintiff next argues that the condition on defendant's front steps presented special aspects to impose liability. Plaintiff contends she had no alternative but to walk over the snow covered ice to enter defendant's home. We disagree.

Under *Lugo*, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the landowner has a duty to undertake reasonable precautions to protect

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[2] Given our conclusion that plaintiff failed to establish that defendant breached a duty, we need not reach plaintiff's additional arguments pertaining to her expert's findings. First, given plaintiff's cursory argument, we need not address the claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). In any event, plaintiff's arguments about the testimony of her expert witness more accurately pertain to proximate causation, see *Corey*, *supra* at 9. See also *Summers v Detroit*, 206 Mich App 46, 51-52; 520 NW2d 356 (1994), citing *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 135; 463 NW2d 442 (1990) (although violation of an ordinance may be some evidence of negligence, it is not in itself sufficient to impose a legal duty cognizable in negligence).

his invitees. *Lugo, supra* at 517. However "only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id*. at 519. In *Lugo*, the Court noted that special aspects would include a situation where an open and obvious condition is "effectively unavoidable," and that "such a situation might involve . . . a commercial building with only one exit for the general public where the floor is covered with standing water." *Lugo, supra* at 518. The Court also noted that a situation that imposed a severe high risk of harm, such as an unguarded thirty-foot deep pit in the middle of a parking lot, created a special aspect. *Id*.

Contrary to plaintiff's argument, the instant case does not involve "special aspects" as explained in *Lugo*. Here, the front steps upon which plaintiff fell did not present a uniquely high severity of harm and were avoidable. Plaintiff' had the option to remain in her car and wait for defendant. Alternatively, there is no evidence in the record that plaintiff was precluded from (1) exiting the house through the side door closest to the driveway, (2) exiting the house through the rear door, or (3) descending the steps on the same side she ascended on her arrival. For these reasons, plaintiff has not demonstrated that the condition of the front steps constituted an effectively unavoidable situation. Nor has plaintiff demonstrated the uniquely high severity of harm contemplated in *Lugo*. "Falling several feet to the ground is not the same as falling an extended distance such as into a thirty-foot-deep pit." *Corey, supra* at 7, citing *Lugo, supra* at 518, 520. Accordingly, we conclude that the trial court did not err in granting summary disposition based on the open and obvious doctrine.

Finally, plaintiff argues that the trial court improperly denied her motion to amend her complaint to add a nuisance claim. Plaintiff claims that "the leaky awning that caused ice to form on the step was a nuisance." We disagree.

Because plaintiff's claim does not concern an invasion of her interest in the private use and enjoyment of land, *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992), plaintiff's claim sounds in public rather than private nuisance.[3] *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190, 684; 540 NW2d 247 (1995) (a public nuisance is an unreasonable interference with a common right enjoyed by the general public).

A public nuisance involves "not only a defect, but threatening or impending danger to the public . . . ." *People ex rel Wayne County Prosecutor v Bennis*, 447 Mich 719, 731-732; 527 NW2d 483(1994), citing *Kilts v Kent Co Bd of Supervisors*, 162 Mich 646, 651; 127 NW 821 (1910). To constitute a public nuisance, an act "offends public decency." *Id*., citing *Bloss v Paris Twp*, 380 Mich 466, 470; 157 NW2d 260 (1968). The activity must be harmful to the public health, or create an interference in the use of a way of travel, or affect public morals, or prevent the public from the peaceful use of their land and the public streets. *Id*., citing *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1957).

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[3] A private nuisance pertains to a civil wrong based on a disturbance in a plaintiff's rights in land. *Williams v Primary Sch Dist # 3, Green Twp*, 3 Mich App 468, 475-476; 142 NW2d 894 (1966); see also *Adkins, supra* at 303.

In support of her contention that the trial court improperly denied her motion to amend her complaint to add a nuisance claim, plaintiff relies solely on this Court's unpublished opinion in *Bishop I*. We need not address plaintiff's argument because *Bishop I* is not binding authority under MCR 7.215. *Dyball v Lennox*, 260 Mich App 698, 705; 680 NW2d 522 (2004) (unpublished opinions are not binding authority under the doctrine of stare decisis). Where the plaintiff has not cited any binding authority to justify the amendment of her complaint to add a nuisance claim, we will not research and analyze the basis for her claims. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).[4]

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder

[4] If we were to address the merits of plaintiff's claim that the front steps and awning constituted a nuisance, we would be led to the conclusion that plaintiff's individual injury from a fall on the steps of a private residence is an insufficient basis to establish a public nuisance. "The fact that [an aggrieved wrong] is committed in a public place does not make it public." *Attorney Gen ex rel Muskegon Booming Co v Evart Booming Co*, 34 Mich 462, 476 (1876). Additionally, plaintiff's cursory argument failed to show how the steps or awning interfered with the rights of the community at large. *Williams v Primary School Dist*, 3 Mich App 468, 476; 142 NW2d 894 (1966).